PD-1043-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 2/15/2017 1:47:53 PM
Accepted 2/15/2017 2:37:56 PM
ABEL ACOSTA
CLERK

No. PD-1043-16

In the
Court of Criminal Appeals

FILED
COURT OF CRIMINAL APPEALS
2/15/2017
ABEL ACOSTA, CLERK

No. 14-14-00595-CR
In the Court of Appeals for the Fourteenth District of Texas at Houston

No. 1378280
In the 230th District Court of Harris County, Texas

JOHNTAY GIBSON
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S BRIEF ON DISCRETIONARY REVIEW

KIM OGG
District Attorney
Harris County, Texas

ERIC KUGLER
Assistant District Attorney
Harris County, Texas
TBC No. 796910
kugler_eric@dao.hctx.net

LISA CALLIGAN
Assistant District Attorney
Harris County, Texas

1201 Franklin, Suite 600
Houston, Texas 77002
Tel.: 713-274-5826
FAX: 713-755-5809

Counsel for Appellee

ORAL ARGUMENT NOT PERMITTED

STATEMENT REGARDING ORAL ARGUMENT

This Court has not permitted oral argument in this case, and none is needed.

IDENTIFICATION OF THE PARTIES

Counsel for the State:

Devon Anderson — District Attorney of Harris County

Eric Kugler — Assistant District Attorney on appeal

Marcy McCorvey; Lisa Calligan — Assistant District Attorneys at trial

Appellant or criminal defendant:

Johntay Gibson

Counsel for Appellant:

Kurt Wentz — Counsel on appeal

R.P. Cornelius — Counsel at trial

Trial Judge:

Hon. Brad Hart — Presiding Judge

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

The appellant was charged with the capital murder of Hamid Waraich committed on February 18, 2013 (CR – 40). The jury found him guilty and sentenced him to life in prison without parole (CR – 224, 226-227) (RR. VIII – 254-257). The court of appeals affirmed the conviction, holding that the appellant failed to preserve his appellate complaint concerning the admission of his seven-hour video-recorded statement. *Gibson v. State*, 14-14-00595-CR, 2016 WL 4254136 (Tex. App.—Houston [14th Dist.] Aug. 11, 2016, pet. granted) (not designated for publication). This Court granted review.

GROUND FOR REVIEW

When the basis for trial counsel's objection to the admission of the appellant's videotaped custodial statement was apparent at trial, the reviewing court should not avoid addressing that apparent issue by holding the appellant's argument on appeal does not comport with trial counsel's objection merely because the apparent issue is more specifically articulated on appeal.

STATEMENT OF FACTS

Hamid Waraich and his wife, Mirna Cortez, owned a business called Boost Mobile (RR. IV – 22-25). On the afternoon of February 18, 2013, Cortez had just finished assisting a female customer with a new phone when two men walked into

the store (RR. IV – 26-33) (RR V 101-104). The taller of the two men, the appellant, approached the cash register while wearing a mask; he pointed a pistol at the married couple and instructed them to get on the floor (RR. IV – 33-36) (RR. V – 104-105, 277-279). The shorter intruder remained near the front door of the business; he was holding his gun on a female customer, Rosemary Saldana, and her two grandchildren (RR. IV – 34) (RR V– 104-106). He took Saldana's purse, which contained her debit card (RR. V – 106-107, 113-114, 118-119).

The appellant was initially unable to open the cash register, so Cortez opened it for him; he took out all the cash, $300, and grabbed several phones that were on the counter, one of which belonged to Cortez (RR. IV – 35-38, 53) (RR. V – 232). The appellant demanded Cortez's jewelry, but she showed him her hands to indicate that she did not have any jewelry (RR. IV – 38-39). When Waraich reached for the panic alarm, the appellant shot him (RR. IV – 39-41, 50, 53-54) (RR V – 109, 113) (St. Ex. 48). After the gunshot, the appellant's accomplice yelled that it was time to go, and they fled the scene (RR. IV – 40-41) (RR V – 109-110).

Paramedics arrived soon after the shooting and transported Waraich to the hospital, but he died from a gunshot wound to his torso (RR. V – 43) (RR. VII – 14-26) (St. Ex. 276, 277-281). After speaking with nearby business employees in the strip center, officers identified a suspect vehicle: a black Pontiac Grand Prix

with paper plates numbered 47K8036 (RR. V – 132-135) (St. Ex. 217). That vehicle was registered to Jermaine Green (RR. V – 135, 231).

Saldana reported her stolen debit card and discovered that it had been used twice within an hour after the murder: once at a McDonald's restaurant and again at a Murphy gas station (RR. V – 113-114, 141-148, 154-155, 172-173, 243). Mark Stahlin with the Houston Police Department (HPD) went to the McDonald's to view the surveillance video; although he could see the suspect vehicle in the drive-through line, he could not see any of the vehicle's occupants (RR. V – 155-157, 160-163) (St. Ex. 66, 67). He also obtained the video surveillance at the gas station (RR. V – 158, 164-165). The video depicted the suspect vehicle driving up to a gas pump; the appellant can be seen getting out of the vehicle and trying to swipe the debit card at the pump (RR. V – 165-168, 243-244, 269-271) (St. Ex. 61- 65, 86-87).

An HPD officer obtained a tracking order for Cortez's cell phone and located the phone at a kiosk in a Fiesta store (RR. V – 233-234). Sergeant Carless Elliott with HPD recovered the phone and made arrangements to obtain the video surveillance from that cellular phone business (RR. V – 234-235) (St. Ex. 2, 2A).

Two days after the murder, Nathan Carroll with HPD stopped the appellant on traffic violations, and the appellant initially gave a false name of Jermaine Green (RR. V – 202-221, 249). Sergeant Elliot saw that there was a black ski

mask in the backseat of the appellant's vehicle (RR. V – 250). Officer Carroll discovered that the appellant had warrants and took him into custody (RR. V – 202-221).

The appellant gave a voluntary statement to Isaac Duplechain with HPD regarding the murder (RR. V – 222-223) (RR. VI – 79-80, 87) (St. Ex. 99, 100). He admitted that he was a part of the robbery, but he claimed that he was only the driver and did not go inside the Boost mobile store (St. Ex. 99, 100). In a statement to his brother, however, the appellant admitted that he was involved in the robbery and didn't mean to kill the man (St. Ex. 107).

SUMMARY OF THE ARGUMENT

The court of appeals held that the appellant's argument on appeal did not comport with any objection raised in the motion to suppress or at the suppression hearing. That was correct because the appellant's boilerplate motion to suppress made no distinction between the first and second parts of his statement whereas his claim on appeal was based on the allegedly unwarned second part of the custodial interrogation. Furthermore, the appellant waived any complaint regarding the second half of his statement when he allowed the interrogating officer to testify about the substance of that statement without any objection.

ARGUMENT

The appellant filed a boilerplate motion to suppress evidence, which alleged that there was no probable cause to detain or arrest him (CR 34-36). The motion also complained that he was not competent to provide consent to search his vehicle or to provide a voluntary statement to law enforcement (CR 34-36). The motion contained no discussion of the particular facts of this case nor did it have any application of those facts to the law (CR – 34-35). And it certainly did not allege that the interrogating officer failed to repeat the legal warnings during the second part of the interview (CR – 34-35).

During the suppression hearing, the State introduced testimony from the officer who stopped the appellant for traffic violations and from the officer who took his statement (RR II 6-39). On February 20, 2013, Officer Carroll was directed to observe a 1999 white Pontiac and make a traffic stop if he observed any traffic violations (RR II 9-12). The appellant was the driver of the vehicle; Carroll saw him commit three traffic violations and stopped the Pontiac (RR II 10-12). The appellant's car smelled of marijuana, he provided a false name to Carroll, and he made a furtive gesture; Carroll detained him (RR II 13-16).

Once Officer Carroll was able to ascertain the appellant's true identity, he discovered that the appellant had three open warrants, so he placed the appellant in custody (RR II 15-18). The appellant consented to a search of his vehicle, and

officers found marijuana (RR II 18-21) (St. Ex. 90). Carroll completed a report for the appellant's offenses of possession of marijuana and failure to identify and then transferred him to the custody HPD's homicide division (RR II 22-24).

Officer Duplechain was assisting with the capital murder investigation that had occurred at Waraich's Boost mobile store on Telephone Road (RR II 24-25). He was asked to interview the appellant regarding the case (RR II 25-26). At approximately 4:30 p.m. on the day that the appellant was arrested, Duplechain introduced himself to the appellant in an interview room in the homicide division (RR II 26-27) (RR VI 65). He offered the appellant the chance to go to the bathroom and to get something to drink; then he read the appellant his *Miranda* warnings (RR II 26-27) (RR VI 69-70). The appellant waived his rights and spoke to Duplechain about the capital murder; Duplechain testified that the appellant appeared to understand his warnings, as evidenced by his verbal response to each one (RR II 29-36) (RR VI 71-73) (St. Ex. 97, 98).

During the first part of his statement, the appellant provided an alibi for the murder (RR. VI – 74-75) (St. Ex. 99). This lasted less than an hour (RR. VI – 74). The appellant gave Officer Duplechain some phone numbers of people who supposedly could verify his alibi (RR. VI – 75-75) (St. Ex. 99). Duplechain took that information and left the appellant in the interview room for several hours while he tracked down the alibi evidence (RR. VI – 75-77). Duplechain was gone

for approximately five hours, although the video-recorder continued to run throughout the entirety of the appellant's statement (RR. VI – 76). The appellant slept during most of this time, and spoke with Officer Stahlin for about three minutes, providing his birthdate, address, and similar information (RR. VI – 76-78) (St. Ex. 99).

When Duplechain returned to the interview room, he immediately verified that the appellant had food and asked the appellant whether he needed anything, including the use of the restroom (RR. VI – 78) (St. Ex. 99). Once he was sure that the appellant was comfortable, Duplechain told the appellant that he ran down some of the alibi information and wanted to share that with him (St. Ex. 99). After Duplechain relayed what he had discovered in his investigation, the appellant conceded that he was involved in the crime (St. Ex. 99). But he admitted to being only the getaway driver (St. Ex. 99).

The second portion of the statement lasted just under one hour (St. Ex. 99). Duplechain estimated that the entire process was about seven hours, with an approximate five-hour break between the two parts of the statement (RR. VI – 766-78) (St. Ex. 99, 100). Toward the end of the second portion, the appellant invoked his right to an attorney, and Duplechain immediately stopped the interview (RR. VI – 77) (St. Ex. 99).

The appellant did not present any evidence at the suppression hearing (RR. II – 41). At the conclusion of the hearing, he told the trial court that he was relying on the issues set forth in his written motion to suppress (RR II 41-42). In fact, this was the entirety of the appellant's argument: "I just want to put in the record that I'm adopting the arguments made in my motion to suppress. That is my argument. I don't think I need to read it to you or re-argue it. But those are my arguments and with that we rest." (RR II 41-42).

The trial court denied the motion to suppress (RR II 43). More than six months later, during the jury trial, the appellant made an additional argument while the State was examining Officer Duplechain in front of the jury:

> There's some specific case law on that. And I don't know if we'll be successful with that point on appeal, but I want to make sure it's there on appeal. He wasn't re-warned. There was a five-hour gap. I don't know if the Court of Appeals would view that as one continuous interview or not. But I'm objecting to it. And asking that it be suppressed, the second part of the interview because of the failure to re-warn him.

(RR. VI – 78). The trial court overruled this additional objection. (RR. VI – 78). When the State offered the recordings of the interview into evidence, the appellant stated, "No additional objections other than we've already discussed," and the recordings were admitted (RR. VI – 80). When the State introduced written transcripts of the recordings for demonstrative purposes, the appellant did not object and instead stated, "we agree, Judge." (RR. VI – 84). The appellant also did

not object when the State proceeded to question Duplechain at length and in detail about comments and admissions made by the appellant during his recorded statement (RR. VI – 87-91, 95-109).

In his sole ground for review, the appellant complains that the court of appeals erred in holding that his "argument on appeal does not comport with any objection raised in the motion to suppress or at the suppression hearing." *Gibson*, 2016 WL 4254136, at *7; (App'nt PDR Brf. 7-10). But that ruling was correct. The appellant's claim on appeal was that the "trial court abused its discretion in denying the appellant's *motion to suppress* his videotaped statement for the reason that peace officers failed to advise him on his Miranda rights…[and] failed to provide the warnings mandated by TEX. CODE CRIM. PROC. ANN. art. 38.22 § 2(a) at the time of his unwarned second custodial interrogation." (App'nt Brf. 39-40) (emphasis added). But his boilerplate motion to suppress made no distinction between the first and second parts of his statement (CR 34-36). And his argument at the suppression hearing merely referred back to his written motion (RR II 41-42). Therefore, the court of appeals was correct. *See Dixon v. State*, 2 S.W.3d 263, 270 (Tex. Crim. App. 1998) ("An objection stating one legal theory may not be used to support a different legal theory on appeal.").

The appellant claimed on appeal that he had re-litigated the suppression issue six months later during the trial when he orally objected to the second half of

his statement. (App't Brf. 40). But his points of error on appeal were addressed to the "motion to suppress," which was the issue decided by the court of appeals. *Gibson*, 2016 WL 4254136, at *7. Therefore, the court of appeals should not be reversed for addressing the claims as framed by the appellant.

Even if the appellant had preserved the two-part interview issue with his oral objection, he subsequently waived it by failing to object when the substance of that interview was later admitted through Duplechain's testimony. It is well-settled that where evidence is admitted erroneously over objection and the same evidence or evidence to the same effect is thereafter admitted without objection, the objection in the first instance is waived. *Kirvin v. State*, 575 S.W.2d 301, 302 (Tex. Crim. App. 1978); *see also Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) ("Our rule...is that overruling an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling.").

In the present case, the appellant made an oral objection to "the second part of the interview because of the failure to re-warn him." (RR. VI – 78). But then he completely failed to object when Duplechain testified at length about the content of the second part of the appellant's statement (RR. VI – 95-109). Duplechain revealed that the appellant's initial alibi had been "that the vehicle had been taken by an unknown friend of Jermaine Green's. And that he had no possession of the

vehicle. And that he was, in fact, at a separate location, Jermaine Green's brother, Samuel's apartment." (RR. VI – 98). Duplechain testified that the appellant then admitted that he was in the surveillance photo from the gas station, which contradicted the appellant's claim to being the driver (RR. VI – 100-101). The appellant repeatedly changed his story regarding where all the coconspirators were sitting in the car (RR. VI – 103).

Duplechain referred to the transcript of the appellant's statement and effectively converted portions of that transcript into substantive evidence through his testimony (RR. VI – 103). Duplechain testified that the appellant's statement that "he heard the gunshot from that vehicle down around the corner backed into a parking spot by the Payless Store," was not a credible statement (RR. VI – 105). Duplechain testified that the appellant contradicted himself when he said that he "heard the gunshot in the store," and then later said that "they just told him that they shot into the store." (RR. VI – 106). The appellant claimed that they were "all in black," but that was inconsistent with the surveillance video (RR. VI – 106-107). The appellant stated, "I didn't touch none of that stuff," but then admitted to taking control of the black Pontiac and taking it to his mother's house (RR. VI – 107). Finally, the appellant called the other person in the store, Eric Washington, his "Little Bro," showing that "their relationship is significantly closer than he previously indicated." (RR. VI – 109).

Thus, because Duplechain revealed the substance of the second part of the appellant's statement through his testimony, evidence to the same effect was admitted without objection, and the appellant's prior oral objection was waived. *Kirvin*, 575 S.W.2d at 302; *see also Leday*, 983 S.W.2d at 718. The court of appeals did not err in refusing to address the substance of the appellant's argument, and its opinion should be affirmed.

PRAYER

It is respectfully requested that the opinion of the court of appeals and the conviction of the trial court should be affirmed.

KIM OGG
District Attorney
Harris County, Texas

/s/ Eric Kugler
ERIC KUGLER
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
(713) 755-5826
kugler_eric@dao.hctx.net
TBC No. 796910

CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that: (a) the word count function of the computer program used to prepare this document reports that there are 3,265 words in it; and (b) a copy of the foregoing instrument will be served by efile.txcourts.gov to:

Kurt Wentz
Attorney at Law
5629 Cypress Creek Pkwy, Suite 115
Houston, Texas 77069
kbsawentz@yahoo.com

Stacy Soule
State Prosecuting Attorney
P.O. Box 13046
Austin, Texas 78711
Stacy.Soule@SPA.texas.gov

/s/ Eric Kugler
ERIC KUGLER
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
(713) 755-5826
TBC No. 796910

Date: February 15, 2017